2011

# State of Utah v. Michael C. Martin : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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| THE STATE OF UTAH, | : | |
| Plaintiff/Appellee, | : | |
| v. | : | |
| MICHAEL C. MARTIN, | : | Case No. 20110056-CA |
| Defendant/Appellant. | : | |

# BRIEF OF APPELLANT

Appeal from a judgment of conviction for one count of Criminal Mischief, a Class A Misdemeanor, in violation of Utah Code Ann. §§ 76-6-106 (2003) and 76-3-402(1) (Supp. 2006), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Deno Himonas, presiding.

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## JURISDICTIONAL STATEMENT

On August 28, 2009, the trial court entered judgment against Appellant Michael Martin for criminal mischief, a class A misdemeanor under Utah Code Ann. §§ 76-6-106 (2003) and 76-3-402(1) (Supp. 2006). On December 17, 2010, the trial court reinstated the time for filing an appeal, pursuant to Rule 4(f), Utah R. App. P. On January 7, 2011, Martin filed his Notice of Appeal. This Court has jurisdiction over the matter pursuant to Utah Code Ann. § 78A-4-103(2)(e) (Supp. 2010). The judgment and the order reinstating the appeal are attached at Addendum A.

## STATEMENT OF THE ISSUE, STANDARD OF REVIEW, PRESERVATION

Issue: Whether the trial court erred when it ruled that Martin violated the conditions of the plea agreement.

Standard of Review: This Court will review the issue for an abuse of discretion. See State v. Jameson, 800 P.2d 798, 804 (Utah 1990); State v. Peterson, 869 P.2d 989,

991 (Utah Ct. App. 1994). A district court abuses its discretion when it fails to properly consider relevant factors and when it misapplies the law. See State v. McCovey, 803 P.2d 1234, 1235 (Utah 1990) ("An abuse of discretion results when the judge 'fails to consider all legally relevant factors'" (note omitted)); State v. Petersen, 810 P.2d 421, 425 (Utah 1991) ("[T]rial courts do not have discretion to misapply the law").

Preservation: The issue was preserved in the record at 197:23, 56-59.

## RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following provisions are relevant to the issue on appeal and set forth at Addendum B: Utah Code Ann. §§ 77-2a-1 to -4 (2008).

## STATEMENT OF THE CASE

**Nature of the Case**: This matter began as a dispute between neighbors, and resulted in charges against Martin for two counts of criminal mischief. In November 2004, the State filed an Information, charging count one as a second-degree felony and count two as a third-degree felony. R.3-5. The State alleged that Martin tore down a fence and cut a tree belonging to his neighbor, Kathryn Randazzo. Id. On December 22, 2004, the trial court ordered Martin to have "no contact with" Ms. Randazzo. R.9.

**Course of the Proceedings**: On September 29, 2005, the State and Martin entered into an agreement to resolve the criminal case, R.51-58, where the State agreed to dismiss count one (the second-degree felony), and Martin agreed to enter a no-contest plea on count two (the third-degree felony). R.51. Also, the trial court agreed to hold the plea on count two in abeyance for one year on the condition that "the defendant replace the chain link fence and replant an elm tree that defendant removed[,] and replace the

shrubs destroyed and to have the work done by a licensed third party." R.55, 60; see also R.188:7, 10-13.

On July 28, 2006, less than ten months after entry of the plea-in-abeyance agreement, the State filed papers for an order to show cause why Martin should not be found in violation of the agreement. R.108-110. On January 19, 2007, the trial court held an evidentiary hearing and ruled that Martin was in violation. See R.124-25. It "revoked" the plea in abeyance and set the matter for sentencing. Id.

**Disposition in the Court Below**: On April 20, 2007, the court entered judgment against Martin for two counts of criminal mischief, and it sentenced him to probation for 24 months. See R.131-33; 192:16-19. On May 8, 2007, the court issued a Memorandum Decision to clarify and correct the judgment. See R.136-39. Pursuant to the Memorandum Decision, the trial court vacated count one – as the parties had intended under the original terms of the plea agreement – and it entered a conviction for a class A misdemeanor on count two. Id. In addition, the court set aside sentencing to assess restitution. R.138-39.

On May 21, 2007, Martin initiated his first appeal by filing a notice. R.141. On February 20, 2009, this Court denied the appeal stating that due to the trial court's Memorandum Decision, there was no final order. Thus, the appeal was premature. See State v. Martin, 2009 UT App 43, ¶15, 204 P.3d 875. This Court returned the case to the trial court, and on August 28, 2009, the court reinstated the judgment. See R.323-24. It ordered Martin to serve a term of 365 days in jail, it suspended the jail term, it ordered probation for 12 months, and it set the matter for a restitution hearing. Id.

In November 2009 and February 2010, the court held restitution hearings and on April 9, 2010, it entered an order for $8,650. R.340-44. On June 24, 2010, Martin initiated an appeal for a second time. R.363. On August 26, 2010, this Court ruled that the appeal was untimely: "Martin was sentenced on his no-contest plea on August 28, 2009. His notice of appeal was not filed within 30 days after entry of the sentence." State v. Martin [II], Case No. 20100536; 2010 UT App 238. Also, the court noted that Martin was not appealing the restitution order but attempting to "reach back to challenge his conviction." Id. n.1. The Court recommended that Martin seek relief under Rule 4(f), Utah R. App. P., if appropriate. Id. n.2.

In September 2010, Martin filed for relief under Rule 4(f), among other things. R.375-79. On December 17, 2010, the Court held an evidentiary hearing, R.448, and Martin testified that after he was sentenced on August 28, 2009, he contacted his trial attorney within the 30-day period to appeal from the sentence and judgment. R.448:13-16. The attorney advised Martin to appeal after the trial court ruled on restitution. R.448:15. Consequently, Martin did not appeal from the August 28 sentence.

At the conclusion of the hearing, the trial court ruled that counsel's advice was incorrect and it led to the failure to file a timely notice of appeal. Also on December 17, 2010, the court reinstated the time for filing the appeal. R.448:23-24; 443. On January 7, 2011, Martin filed a notice of appeal. It is timely. He is not incarcerated.

## STATEMENT OF FACTS

As stated *supra*, this matter originally began as a dispute between neighbors. As a result of the dispute, the State filed an Information against Martin for two counts of

criminal mischief. R.3-5. It alleged that he tore down a fence in Ms. Randazzo's backyard and cut down an elm tree. Id. Several months after the State filed the charges, the parties entered into a plea agreement. R.51-58. The State agreed to dismiss count one of the Information, and Martin agreed to enter a no-contest plea on count two. Id. Also, the trial court agreed to hold the plea on count two in abeyance for one year on the condition that "the defendant replace the chain link fence and replant an elm tree that defendant removed[,] and replace the shrubs destroyed and to have the work done by a licensed third party." R.55; see also R.188:7, 10-13.

On July 28, 2006, the State filed papers for an order to show cause why Martin should not be found in violation of the plea-in-abeyance agreement. R.108-110. According to the papers, Martin violated the plea agreement by "entering the [neighbor's] property and replacing the fence himself." R.109, ¶2. Also, the State alleged that Martin failed to have a damaged tree stump removed from the property prior to restoring landscape. Id., ¶3. It claimed that Martin failed to have the work "completed by a licensed, third party professional." Id. And it claimed that Martin failed to "replace the foliage that was taken commensurate in value to the one destroyed." Id., ¶4. According to the papers, the original tree that was damaged "was a well established tree valued at the time around $4,000.00. The defendant replaced the tree with a sapling valued at approximately $25.00." Id.

On January 19, 2007, the court held an evidentiary hearing where Ms. Randazzo discussed the fence, the tree and the foliage in her yard. R.197:5-6. She acknowledged that the fence had been replaced. R.197:10. However, she claimed the posts were

uneven, the gate did not close properly, the fence bowed in the middle, and it was not on her property line. R.197:10, 17-19, 24; but see R.197:26. In addition, according to Ms. Randazzo, she had not been contacted by a third-party licensed contractor to do any of the replacement work. R.197:7, 10.

Ms. Randazzo acknowledged she had received a replacement tree. However, she complained that the old tree stump had not been removed, and the original elm had not been replaced with a mature tree of commensurate value. R.197:7-9, 26. Instead, she received a sapling valued at $29.97. R.197:8-9. Also, Ms. Randazzo acknowledged foliage and vines now, R.197:27, where vines originally were destroyed. R.197:19-20.

After Ms. Randazzo testified, the prosecutor called additional witnesses. He called Stacey Poppleton, Ms. Randazzo's neighbor, to testify that she had seen Martin "fiddling" with an end cap or finial on a corner post of the fence in the fall or winter of the previous year. R.197:32-33, 36. Also, the prosecutor presented evidence from Joseph Johnson concerning the value of destroyed foliage. R.197:40.

Martin then testified. He discussed the chain-link fence and foliage. He replaced the fence and reinforced it with help from a third-party licensed electrician "slash handyman," Evan Lee. R.197:47, 48. Martin acknowledged that Lee and he did the work together, he assisted when needed, and he was able to assist without trespassing on Ms. Randazzo's property. R.197:49-50, 52-53. Martin explained the need for a licensed electrician in installing a chain-linked fence. R.197:50, 52. Also, he acknowledged that Lee was not present at all times throughout installation of the fence, but Lee did most of the work and he was there "[t]he majority of the time." R.197:50, 55.

With respect to the foliage, Martin identified vines on the property. See R.197:45-46; Defendant's Exhibits 2 & 3. And he testified that he purchased a tree as a replacement for the elm, but did not know what to do with it. R.197:53-54. He contacted his attorney for advice and tried to communicate with the assistant district attorney but received no information. Id. Martin testified that the tree was still available. R.197:54.

After Martin testified, the trial court ruled as follows:

> I think [Mr. Martin has] frankly acknowledged, at least in my mind, the work was not done as ordered by a third-party.
>
> At least what I've heard – and I'll let you address it if you want. One, I don't hear anything to suggest he's violated the no contact order. Two, the shrubbery, no real basis for finding that. Three, the tree, frankly, the order is ambiguous. If it wasn't ambiguous, you wouldn't be offering that sapling as a replacement, that's – certainly doesn't violate the letter; you've absolutely violated the spirit of the agreement. And last, though, is the third-party agreement, that it be done by a licensed third party. You know, one of the reasons was – that is, so we wouldn't have this exact kind of issue. The fact is, color it however you want, he was out there with a third-party doing the work, and not supervised by the third-party at all times.

R.197:55-56; see also id. at 197:57 (stating the order required that "all work be[] done by a third-party, and you tell me he's just assisting, and somebody is looking over his shoulder. It's not being done by him. And, frankly, he's admitting that he wasn't supervised at all times by the third-party"); id. at 197:59 ("My ruling as to the plea in abeyance goes solely to not having all work done by a licensed third-party, period"). The court then set the matter for sentencing. See R.197:66. Martin's appeal challenges the trial court's ruling as it relates to the alleged violations of the plea-in-abeyance agreement.

## SUMMARY OF THE ARGUMENT

Martin and the State entered into an agreement, whereby Martin agreed to replace a fence and foliage in his neighbor's yard, and he agreed to have the work done by a licensed third party. Sometime after entering into the agreement, the State filed an order to show cause, alleging that Martin was in violation of the agreement. Thereafter, the trial court held a hearing on the matter.

At the conclusion of the hearing, the trial court found that Martin violated the agreement because he assisted the third party in replacing the fence, and he was not supervised by the third party at all times in doing the work. Martin does not dispute the trial court's findings. Rather, he maintains that the plea-in-abeyance agreement did not prohibit him from assisting with the work and it did not require that all work be done totally, exclusively, and solely by the third party.

In addition, to the extent the trial court intended the plea agreement to be so restrictive, it was required to ensure that when the parties entered into the agreement, it contained such terms explicitly and unambiguously. Since the agreement failed to set out those terms, the trial court could not later apply them against Martin for a violation. Moreover, Martin was in substantial compliance with the terms and conditions of the agreement.

Based on the record here, the trial court erred in ruling that Martin was in violation of the agreement, and its error constituted an abuse of discretion. Martin respectfully requests that this Court reverse the trial court ruling and reinstate the agreement.

## ARGUMENT

### THE TRIAL COURT FOUND MARTIN TO BE IN VIOLATION OF TERMS THAT WERE NOT EXPLICITLY SET FORTH IN THE PLEA AGREEMENT. THAT WAS ERROR.

A. AN AGREEMENT FOR A PLEA-IN-ABEYANCE MUST CONTAIN EXPLICIT CONDITIONS.

(1) *Utah Law Requires the Agreement to Include a Full, Detailed Recitation of the Terms*. Title 77, Chapter 2a governs plea-in-abeyance agreements. It states the following:

> (a) Any plea in abeyance agreement entered into between the prosecution and the defendant and approved by the court shall include a full, detailed recitation of the requirements and conditions agreed to by the defendant and the reason for requesting the court to hold the plea in abeyance.
>
> (b) If the plea is to a felony or any combination of misdemeanors and felonies, the agreement shall be in writing and shall, prior to acceptance by the court, be executed by the prosecuting attorney, the defendant, and the defendant's counsel in the presence of the court.

Utah Code Ann. § 77-2a-2(4); see also id. at § 77-2a-1(1) (requiring conditions to be set forth in the plea-in-abeyance agreement); State v. Turnbow, 2001 UT App 59, ¶10, 21 P.3d 249 (defining a plea-in-abeyance agreement). By its plain language, the statute requires an agreement to "include a full, detailed recitation" of the conditions, and it requires the agreement to be in writing if the plea is for a felony.

Also, Rule 11 governs plea agreements. It states that a court may not accept a plea in a case until it has made findings as to "what agreement has been reached." Utah R. Crim. P. 11(e)(6) (2010); see also Utah Code Ann. § 77-2a-3(1)(a). To that end, "[t]he trial judge should [still] review the statements in the affidavit with the defendant, ques-

tion the defendant concerning his understanding of it, and fulfill the other requirements imposed by [rule 11] on the record" before accepting the plea. State v. Lehi, 2003 UT App 212, ¶10, 73 P.3d 985 (alterations in original; citation omitted); see also Utah R. Crim. P. 11(e) (the trial court's findings for the plea agreement "may be based on questioning of the defendant on the record" or a "written statement" where the court has established that the defendant read, understood, and acknowledged the statement).

Likewise, case law requires the terms of a plea agreement to be explicit and unambiguous. See United States v. Burns, 160 F.3d 82, 83 (1st Cir.1998) ("significant plea-agreement terms should be stated explicitly and unambiguously so as to preclude their subsequent circumvention by either party"); see also State v. Mora, 2003 UT App 117, ¶19, 69 P.3d 838 ("'[a]ny omissions or ambiguities in the affidavit must be clarified during the plea hearing, as must any uncertainties raised in the course of the plea colloquy'" (citation omitted)). A trial court must ensure that an agreement is clear to all parties and it must ensure that defendant has a full understanding of the terms and conditions of the plea. See, e.g. State v. Martinez, 2001 UT 12, ¶22, 26 P.3d 203 (the purpose of Rule 11 is to ensure that the defendant's plea is knowing and voluntary and he is aware of the consequences of a plea); see also State v. Gibbons, 740 P.2d 1309, 1312 (Utah 1987) ("Rule 11(e) squarely places on trial courts the burden of ensuring that constitutional and Rule 11(e) requirements are complied with when a guilty plea is entered").

(2) *Ambiguous Terms in a Plea Agreement Are Construed in Favor of the Defendant*. "Many courts, including the Utah Supreme Court and the United States

Supreme Court, have referred to plea agreements as contracts," but principles in contract law "'cannot be blindly incorporated into the criminal law in the area of plea bargaining.'" State v. Patience, 944 P.2d 381, 386-387 (Utah Ct. App. 1997) (quoting United States v. Ocanas, 628 F.2d 353, 358 (5th Cir.1980); see also United States v. Olesen, 920 F.2d 538, 541, 542 (8th Cir.1990) ("[p]lea agreements are *like* contracts; however, they are not contracts, and therefore contract doctrines do not always apply to them;" also "[t]his court has . . . acknowledged the inherent limits of the contract analogy") (emphasis in original)).

"For example, in interpreting plea agreements or determining their validity, courts may in certain circumstances hold the government to a higher standard than the defendant." Patience, 944 P.2d at 387 (citing United States v. Ringling, 988 F.2d 504, 506 (4th Cir. 1993) ("'[B]oth constitutional and supervisory concerns require holding the government to a greater degree of responsibility than the defendant ... for imprecisions or ambiguities in plea agreements'") (quoting United States v. Harvey, 791 F.2d 294, 300 (4th Cir.1986))). Specifically, a court may construe ambiguities against the government and in favor of the defendant. See, e.g., United States v. Jefferies, 908 F.2d 1520, 1523 (11th Cir. 1990); see also United States v. Franco-Lopez, 312 F.3d 984, 989 (9th Cir. 2002); In re Altro, 180 F.3d 372, 375 (2d Cir. 1999). That is because, unlike ordinary contracts, the government enjoys significant bargaining power and the plea agreement calls for a defendant to waive fundamental constitutional rights. See, e.g. Altro, 180 F.3d at 375; Jefferies, 908 F.2d at 1523.

(3) *A Trial Court May Revoke an Agreement if the Defendant Has Failed to Substantially Comply with the Terms*. Utah statutory law states the following,

> If, at any time during the term of the plea in abeyance agreement, information comes to the attention of the prosecuting attorney or the court that the defendant has violated any condition of the agreement, the court, at the request of the prosecuting attorney, made by appropriate motion and affidavit, or upon its own motion, may issue an order requiring the defendant to appear before the court at a designated time and place to show cause why the court should not find the terms of the agreement to have been violated and why the agreement should not be terminated. If, following an evidentiary hearing, the court finds that the defendant has failed to substantially comply with any term or condition of the plea in abeyance agreement, it may terminate the agreement and enter judgment of conviction and impose sentence against the defendant for the offense to which the original plea was entered. Upon entry of judgment of conviction and imposition of sentence, any amounts paid by the defendant as a plea in abeyance fee prior to termination of the agreement shall be credited against any fine imposed by the court.

Utah Code Ann. § 77-2a-4(1); Turnbow, 2001 UT App 59, ¶14 (agreeing that a "plea in abeyance differs from probation in both its statutory provisions and function. Thus, cases decided under the probation statutes are not directly applicable to pleas in abeyance").

In construing § 77-2a-4, this Court begins with the plain language. See Turnbow, 2001 UT App 59, ¶16. The plain language of the statute allows the trial court to terminate a plea-in-abeyance agreement if the court finds that the defendant "failed to substantially comply" with the terms or conditions. The phrase "substantially comply" or "substantial performance" is defined in Black's Law Dictionary for plain-language construction. Under the substantial-compliance doctrine, if a party's "good-faith attempt to perform does not precisely meet the terms of an agreement or statutory requirements," but the essential purpose is accomplished, performance is considered to be complete. Black's Law Dictionary, 1566 (9th ed. 2009). That is, under substantial

compliance, a party accomplishes the essential purpose of the agreement with a good faith attempt, even if the party does not specifically meet the terms of the agreement. In addition, under the doctrine, the party is "subject to a claim for damages" for any shortfall. Id.; see also State v. Hoff, 814 P.2d 1119, 1125 (Utah 1991) (early cases required the trial court to *comply substantially* with the law when taking a guilty plea; under that standard, the supreme court may uphold a plea where the trial judge "made no inquiry into the elements of the offense charged and their relationship to the facts", but it may not uphold a plea which results in a "significant departure from Rule 11" and "considerable doubt as to whether a defendant's plea was knowing and voluntary").

B. THE TRIAL COURT RULED THAT MARTIN VIOLATED THE AGREEMENT BY ASSISTING THE LICENSED THIRD PARTY WITH THE WORK. YET THE PLEA AGREEMENT DID NOT PROHIBIT MARTIN FROM ASSISTING.

In this case, Martin and the State entered into a plea agreement on September 29, 2005, wherein Martin entered into a no-contest plea for criminal mischief (a third degree felony), and he agreed to replace a chain-link fence and foliage that were removed from Ms. Randazzo's yard. R.55. Also, the agreement required Martin "to have the work done by a licensed third party." Id. In addition, Martin was under a "no contact" order; he was prohibited from trespassing on Ms. Randazzo's property. R.9.

On July 28, 2006, the state filed an order to show cause alleging violations of the agreement. R.108-110. On January 19, 2007, the trial court conducted an evidentiary hearing on the matter. R.197. At the conclusion of the evidence and over the objections of defense counsel, R.197:56-59, the trial court ruled that Martin had violated the

agreement when he assisted the third party with the work. The judge stated:

> I think [Mr. Martin has] frankly acknowledged, at least in my mind, the work was not done as ordered by a third-party.
>
> At least what I've heard – and I'll let you address it if you want. One, I don't hear anything to suggest he's violated the no contact order. Two, the shrubbery, no real basis for finding that. Three, the tree, frankly, the order is ambiguous. If it wasn't ambiguous, you wouldn't be offering that sapling as a replacement, that's – certainly doesn't violate the letter; you've absolutely violated the spirit of the agreement. And last, though, is the third-party agreement, that it be done by a licensed third party. You know, one of the reasons was – that is, so we wouldn't have this exact kind of issue. The fact is, color it however you want, he was out there with a third-party doing the work, and not supervised by the third-party at all times.

R.197:55-56 (emphasis added); see also id. at 197:57 (stating the order required that "all work be[] done by a third-party, and you tell me he's just assisting, and somebody is looking over his shoulder. It's not being done by him. And, frankly, he's admitting that he wasn't supervised at all times by the third-party"); id. at 197:59 ("My ruling as to the plea in abeyance goes solely to not having all work done by a licensed third-party"). The trial court's ruling is attached as Addendum C.

In this case, Martin does not dispute that the evidence presented at the show-cause hearing supports that he was "out there with a third-party doing the work," he "wasn't supervised at all times by the third-party," R.197:56, 57, and he did not have all work done solely by the licensed third party. R.197:59. Indeed, the evidence supports that Martin worked with a licensed third party, Evan Lee, to replace and reinforce the fence. See R.197:47, 48; Defendant's Exhibits 5 & 7. Martin acknowledged that Lee and he did the work together; Martin assisted when needed; and he was able to assist without trespassing on Ms. Randazzo's property. R.197:47-50, 52-53; see also R.197:32-34, 36

(Stacey Poppleton saw Martin working on the corner end post fitting an end cap). He acknowledged that Lee was not present at all times throughout installation of the fence, but Lee did most of the work and he was there "[t]he majority of the time." R.197:50, 55. Martin poured the concrete to secure the posts and design of the fence. R.197:50-51.

Also, Martin presented evidence relating to the vines on Ms. Randazzo's property (see R.197:45-46; Defendant's Exhibit 3); and he testified that he purchased a tree as a replacement for the elm, but did not know what to do with it. R.197:53-54. He contacted his attorney for advice and tried communicating with the assistant district attorney but received no information. Id. Martin testified that the tree was still available. R.197:54. Martin's testimony is attached as Addendum D.

Based on the evidence here, Martin complied with the terms of the plea-in-abeyance agreement. Where the trial court ruled that Martin violated the agreement, that ruling was in error and an abuse of discretion for several reasons.

First, under the plain language of § 77-2a-2(4), the trial court was required to include "a full, detailed recitation" of the conditions enforceable against defendant in the agreement, and the agreement was required to be in writing. Utah Code Ann. § 77-2a-2(4); Utah Code Ann. § 77-2a-1(1) (specific conditions must be set forth in the agreement); Utah R. Crim. P. 11(e)(6) (a trial court may not accept a plea until it has made findings as to "what agreement has been reached"); Burns, 160 F.3d at 83 (significant terms of the agreement should be stated explicitly and unambiguously "so as to preclude their subsequent circumvention by either party"); Mora, 2003 UT App 117, ¶19 ("'[a]ny omissions or ambiguities in the affidavit must be clarified during the plea hearing, as

must any uncertainties raised in the course of the plea colloquy'") (citation omitted).

If the trial court had intended to prevent Martin from assisting the third party in the work, the trial court was required to include that condition expressly in the agreement. See, e.g., Utah Code Ann. §§ 77-2a-2(4), 77-2a-1(1); Utah R. Crim. P. 11(e)(6); Burns, 160 F.3d at 83; Mora, 2003 UT App 117, ¶ 19. As it stands, the written agreement did not prohibit Martin from assisting with or doing some work; it did not require that the work be done exclusively or solely by a third party; and it did not mandate that a third party supervise Martin at all times. R.55 (requiring Martin to "replace the chain link fence and replant an elm tree that defendant removed[,] and replace the shrubs destroyed and to have the work done by a licensed third party"). In short, a "full, detailed recitation of the requirements" (Utah Code Ann. § 77-2a-2(4)) did not include the restrictions identified at the show-cause hearing by the trial court. Compare R.55, and R.197:55-57. Thus, the trial court abused its discretion when it ruled that Martin violated a provision not specified in the agreement. See Petersen, 810 P.2d at 425 ("[T]rial courts do not have discretion to misapply the law").

Second, the trial court's post-hoc interpretation of the agreement – to preclude Martin from assisting the third-party contractor and from doing the work – was improper. Under the law of plea agreements, where terms are ambiguous, a court will construe them against the government. See, e.g., In re Altro, 180 F.3d at 375; Jefferies, 908 F.2d at 1523; see also Bickley, 2002 UT App 342, ¶¶12-13 (the trial court failed to firmly establish defendant's responsibilities at the time of the agreement, resulting in error); see also Mora, 2003 UT App 117, ¶19 ("'[a]ny omissions or ambiguities in the affidavit must

be clarified during the plea hearing, as must any uncertainties raised in the course of the plea colloquy'" (cite omitted)). That is because unlike ordinary contracts, a plea agreement calls for a defendant to waive fundamental constitutional rights. See In re Altro, 180 F.3d at 375; Jefferies, 908 F.2d at 1523.

Here, the trial court interpreted the language in the agreement – requiring Martin to "replace the chain link fence" and "have the work done by a licensed third party," R.55 – to require the work to be done exclusively and solely by a licensed third party without assistance from Martin. R.197:55-57. But the agreement was silent on that point. See R.55. Consequently, the trial court abused its discretion when it interpreted or imported language into the agreement against Martin for a violation here. See R.197:23, 56-58.

Third, Martin substantially complied with the terms of the agreement. Where the agreement required Martin to "replace the chain link fence and replant an elm tree that defendant removed[,] and replace the shrubs destroyed and to have the work done by a licensed third party," R.55, the trial court ruled that Martin did not violate the agreement on the no-contact order and shrubbery; and it ruled that the agreement for the tree was ambiguous. Therefore, the court found no violation there. R.197:55-56. In addition, the evidence shows that Martin made *bona fide* efforts to satisfy the final term of the agreement by replacing the chain-link fence.

Specifically, Martin replaced and reinforced the fence, R.55, 197:45; and while he was not supervised in the work at all times, he assisted with building the fence and the work was "done by a licensed third party." R.55; 197:48-49; R.197:55-57 (ruling that Martin was "out there with a third-party doing the work," he was assisting and he "wasn't

supervised at all times by the third-party"). Martin and the third-party contractor worked together at times. R.197:49. The third party "did most of the work on, as far as tying off of the fence, and installing the electrical rod, which is required for grounding of a chain-link fence." R.197:50. The third party was there "[t]he majority of the time" for the work, R.197:50; and Martin was present: he "offered assistance when needed" and poured concrete. R.197:49-51, 55.

The record shows Martin's good faith attempt to comply and it shows that Martin accomplished the essential purpose of the agreement by building the fence. The record supports substantial compliance. Utah Code Ann. § 77-2a-4(1) (requiring substantial compliance); Black's Law Dictionary, 1566 (defining substantial performance or compliance). There was no "significant departure" which would lead to "considerable doubt" (Hoff, 814 P.2d at 1125 (discussing substantial compliance in the context of a plea agreement)) about whether Martin "replace[d] the chain link fence" and "ha[d] the work done by a licensed third party." R.55, 60. In this case, the trial court failed to acknowledge the substantial-compliance standard set forth in the statute. See Utah Code Ann. § 77-2a-4; see also R.197:55-57 (making no mention of the statute). Where the record supports that standard, the trial court abused its discretion in failing to apply it. See Petersen, 810 P.2d at 425 ("[T]rial courts do not have discretion to misapply the law").

## CONCLUSION

To the extent the agreement may be construed as represented by the trial judge at the show-cause hearing, that construction was not explained to Martin when he entered into the agreement, and it cannot apply to him at this juncture. Also, that construction

was ambiguous. Moreover, Martin substantially complied with the terms of the agreement. In this case, the trial court abused its discretion when it ruled that Martin violated the agreement. Martin respectfully requests that this Court reverse the trial court ruling and reinstate the agreement since Martin was not in violation of its terms and conditions.

SUBMITTED this 28th day of April, 2011.

Linda M. Jones
SALT LAKE LEGAL DEFENDER
Attorney for Defendant/Appellant

## CERTIFICATE OF DELIVERY

I, Linda M. Jones, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 28th day of April, 2011.

LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this 28day of April, 2011.

Tab A

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

| | | |
|---|---|---|
| STATE OF UTAH,<br>Plaintiff, | : | MINUTES<br>SENTENCE, JUDGMENT, COMMITMENT<br>NOTICE |
| vs.<br>MICHAEL C MARTIN,<br>Defendant. | : | Case No: 041907590 FS<br>Judge: DENO HIMONAS<br>Date: August 28, 2009 |

PRESENT
Clerk: krisu
Prosecutor: BURMESTER, BYRON F
Defendant
Defendant's Attorney(s): FUELLING, BRENNON L

DEFENDANT INFORMATION
Date of birth: April 28, 1963
Audio
Tape Number: S44 Tape Count: 2:15

CHARGES
2. CRIMINAL MISCHIEF - Class A Misdemeanor
Plea: No Contest - Disposition: 03/09/2007 Guilty

SENTENCE JAIL
Based on the defendant's conviction of CRIMINAL MISCHIEF a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s)
The total time suspended for this charge is 365 day(s).

SENTENCE FINE

| | |
|---|---|
| Charge # 2 Fine: | $2500.00 |
| Suspended: | $2500.00 |
| Total Fine: | $2500.00 |
| Total Suspended: | $2500.00 |
| Total Surcharge: | $0 |
| Total Principal Due: | $0 |
| | Plus Interest |

ORDER OF PROBATION

The defendant is placed on probation for 12 month(s).
Probation is to be supervised by THIRD DISTRICT COURT.

Case No: 041907590
Date: Aug 28, 2009

---

PROBATION CONDITIONS

Violate no laws.
Pay full & complete restitution.
Complete 25 hours of community service with proof to the court within 6 months.

RESTITUTION HEARING is scheduled.
Date: 11/06/2009
Time: 02:00 p.m.
Location: Fourth Floor - S44
Third District Court
450 South State
SLC, UT 84114-1860
Before Judge: DENO HIMONAS

Date: 8/31/09

DENO HIMONAS
District Court Judge

Individuals needing special accommodations (including auxiliary communicative aids and services) should call Third District Court-Salt Lake at (801)238-7500 three days prior to the hearing. For TTY service call Utah Relay at 800-346-4128. The general information phone number is (801)238-7300.

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.
DATE: January 25, 2011

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

| | | |
|---|---|---|
| STATE OF UTAH,<br>Plaintiff, | : | MINUTES<br>MANNING HEARING/ORDER |
| vs. | : | Case No: 041907590 FS |
| MICHAEL C MARTIN,<br>Defendant. | : | Judge: DENO HIMONAS<br>Date: December 17, 2010 |

PRESENT
Clerk: kristenl
Prosecutor: BURMESTER, BYRON F
Defendant
Defendant's Attorney(s): SIMMS, CLAYTON A

DEFENDANT INFORMATION
Date of birth: April 28, 1963
Audio
Tape Number: S44 Tape Count: 2:51-3:13

CHARGES
2. CRIMINAL MISCHIEF - Class A Misdemeanor
Plea: No Contest - Disposition: 03/09/2007 Guilty

HEARING

Start times: 2:28, 2:41 and 2:51.
COUNT: 2:52
Defendant is sworn and testifies on his own behalf.
COUNT: 3:05
Cross examination.
COUNT: 3:05
Re-direct.
COUNT: 3:06
Argument. Court denies the motion to strike. Court is reinstating the time for appeal. Defendant has 30 days from today to file appeal.

Date: 12/17/10

DENO HIMONAS
District Court Judge

STATE OF UTAH THIRD DISTRICT COURT SALT LAKE CITY

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.
DATE: January 25, 2011

Tab B

# UTAH CODE ANN. § 77-2a-1

## § 77-2a-1. Definitions

For the purposes of this chapter:

(1) "Plea in abeyance" means an order by a court, upon motion of the prosecution and the defendant, accepting a plea of guilty or of no contest from the defendant but not, at that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions as set forth in a plea in abeyance agreement.

(2) "Plea in abeyance agreement" means an agreement entered into between the prosecution and the defendant setting forth the specific terms and conditions upon which, following acceptance of the agreement by the court, a plea may be held in abeyance.

# UTAH CODE ANN. § 77-2a-2

## § 77-2a-2. Plea in abeyance agreement--Negotiation--Contents--Terms of agreement--Waiver of time for sentencing

(1) At any time after acceptance of a plea of guilty or no contest but prior to entry of judgment of conviction and imposition of sentence, the court may, upon motion of both the prosecuting attorney and the defendant, hold the plea in abeyance and not enter judgment of conviction against the defendant nor impose sentence upon the defendant within the time periods contained in Rule 22(a), Utah Rules of Criminal Procedure.

(2) The defendant shall be represented by counsel during negotiations for a plea in abeyance and at the time of acknowledgment and affirmation of any plea in abeyance agreement unless the defendant shall have knowingly and intelligently waived his right to counsel.

(3) The defendant has the right to be represented by counsel at any court hearing relating to a plea in abeyance agreement.

(4)(a) Any plea in abeyance agreement entered into between the prosecution and the defendant and approved by the court shall include a full, detailed recitation of the requirements and conditions agreed to by the defendant and the reason for requesting the court to hold the plea in abeyance.

(b) If the plea is to a felony or any combination of misdemeanors and felonies, the agreement shall be in writing and shall, prior to acceptance by the court, be executed by the prosecuting attorney, the defendant, and the defendant's counsel in the presence of the court.

(5) A plea shall not be held in abeyance for a period longer than 18 months if the plea was to any class of misdemeanor or longer than three years if the plea was to any degree of felony or to any combination of misdemeanors and felonies.

(6) A plea in abeyance agreement shall not be approved unless the defendant, before the court, and any written agreement, knowingly and intelligently waives time for sentencing as designated in Rule 22(a), Utah Rules of Criminal Procedure.

## UTAH CODE ANN. § 77-2a-3

### § 77-2a-3. Manner of entry of plea--Powers of court

(1)(a) Acceptance of any plea in anticipation of a plea in abeyance agreement shall be done in full compliance with the provisions of Rule 11, Utah Rules of Criminal Procedure.

(b) In cases charging offenses for which bail may be forfeited, a plea in abeyance agreement may be entered into without a personal appearance before a magistrate.

(2) A plea in abeyance agreement may provide that the court may, upon finding that the defendant has successfully completed the terms of the agreement:

(a) reduce the degree of the offense and enter judgment of conviction and impose sentence for a lower degree of offense; or

(b) allow withdrawal of defendant's plea and order the dismissal of the case.

(3) Upon finding that a defendant has successfully completed the terms of a plea in abeyance agreement, the court may reduce the degree of the offense or dismiss the case only as provided in the plea in abeyance agreement or as agreed to by all parties. Upon sentencing a defendant for any lesser offense pursuant to a plea in abeyance agreement, the court may not invoke Section 76-3-402 to further reduce the degree of the offense.

(4) The court may require the Department of Corrections to assist in the administration of the plea in abeyance agreement as if the defendant were on probation to the court under Section 77-18-1.

(5) The terms of a plea in abeyance agreement may include:

(a) an order that the defendant pay a nonrefundable plea in abeyance fee, with a surcharge based on the amount of the plea in abeyance fee, both of which shall be allocated in the same manner as if paid as a fine for a criminal conviction under Section 78A-5-110 and a surcharge under Title 51, Chapter 9, Part 4, Criminal Conviction Surcharge Allocation, and which may not exceed in amount the maximum fine and

surcharge which could have been imposed upon conviction and sentencing for the same offense;

(b) an order that the defendant pay restitution to the victims of the defendant's actions as provided in Title 77, Chapter 38a, Crime Victims Restitution Act;

(c) an order that the defendant pay the costs of any remedial or rehabilitative program required by the terms of the agreement; and

(d) an order that the defendant comply with any other conditions which could have been imposed as conditions of probation upon conviction and sentencing for the same offense.

(6) A court may not hold a plea in abeyance without the consent of both the prosecuting attorney and the defendant. A decision by a prosecuting attorney not to agree to a plea in abeyance is final.

(7) No plea may be held in abeyance in any case involving a sexual offense against a victim who is under the age of 14.

(8) Beginning on July 1, 2008, no plea may be held in abeyance in any case involving a driving under the influence violation under Section 41-6a-502.

## UTAH CODE ANN. § 77-2a-4

### § 77-2a-4. Violation of plea in abeyance agreement--Hearing--Entry of judgment and imposition of sentence--Subsequent prosecutions

(1) If, at any time during the term of the plea in abeyance agreement, information comes to the attention of the prosecuting attorney or the court that the defendant has violated any condition of the agreement, the court, at the request of the prosecuting attorney, made by appropriate motion and affidavit, or upon its own motion, may issue an order requiring the defendant to appear before the court at a designated time and place to show cause why the court should not find the terms of the agreement to have been violated and why the agreement should not be terminated. If, following an evidentiary hearing, the court finds that the defendant has failed to substantially comply with any term or condition of the plea in abeyance agreement, it may terminate the agreement and enter judgment of conviction and impose sentence against the defendant for the offense to which the original plea was entered. Upon entry of judgment of conviction and imposition of sentence, any amounts paid by the defendant as a plea in abeyance fee prior to termination of the agreement shall be credited against any fine imposed by the court.

(2) The termination of a plea in abeyance agreement and subsequent entry of judgment of conviction and imposition of sentence shall not bar any independent prosecution arising from any offense that constituted a violation of any term or condition of an agreement whereby the original plea was placed in abeyance.

Tab C

ORIGINAL

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

| | | |
|---|---|---|
| THE STATE OF UTAH, Plaintiff/Appellee, | ) | 20070426-CA |
| vs. | ) | Case No. 041907590 FS |
| MICHAEL M. MARTIN, Defendant/Appellant. | ) | Hon. Deno G. Himonas |

THE ABOVE captioned matter came before the Honorable Deno G. Himonas, on January 19, 2007, at the Matheson Courthouse, Salt Lake City, Utah.

For the State:

FRED BURMESTER
TOM LOPRESTO
Deputy DA's



For the Defendant:

KEVIN KURUMADA
Attorney at Law



Transcriber:



CARLTON WAY CCT



~~20070426-CA~~



20110056-CA

Siberian elm.

Q. Do you know what kind of tree it is?

A. I believe it's a maple tree.

Q. Okay.

MR. KURUMADA: Thank you.

That's all I have.

CROSS-EXAMINATION

BY MR. BURMESTER:

Q. Who replaced the fence?

A. Mr. Lee.

Q. All right. But you were there?

A. Yes, I was there present and he did the tying off of the fence.

Q. When?

A. When? Exact -- in the course of this --

THE COURT: I've heard enough, Mr. Burmester.

MR. BURMESTER: You don't want anymore examination?

THE COURT: (Inaudible).

MR. BURMESTER: Okay.

THE COURT: I don't think so, I mean --

MR. KURUMADA: That's fine.

THE COURT: -- Mr. Kurumada, I think he's frankly acknowledged, at least in my mind, the work

was not done as ordered by a third-party.

At least what I've heard -- and I'll let you address it if you want. One, I don't hear anything to suggest he's violated the no contact order. Two, the shrubbery, no real basis for finding that. Three, the tree, frankly, the order is ambiguous. If it wasn't ambiguous, you wouldn't be offering that sapling as a replacement, that's -- certainly doesn't violate the letter; you've absolutely violated the spirit of the agreement. And last, though, is the third-party agreement, that it be done by a licensed third-party. You know, one of the reasons was -- that is, so we wouldn't have this exact kind of issue. The fact is, color it however you want, he was out there with a third-party doing the work, and not supervised by the third-party at all times.

MR. KURUMADA: The only argument I'd offer, Your Honor, is: The work is supposed to be done by a third-party, but it's not --

THE COURT: All work.

MR. KURUMADA: It's not -- it doesn't prohibit him from assisting a third party. And that's what he's doing, he's trying to assist labor to cover the costs.

THE COURT: You can sit down.

MR. KURUMADA: That's --

THE COURT: Well, then all work isn't being done by a third-party. I mean, the order is all work being done by a third-party, and you tell me he's just assisting, and somebody is looking over his shoulder. It's not being done by him. And, frankly, he's admitted that he wasn't supervised at all times by the third-party.

You can step down, Mr. Martin.

THE WITNESS: All right.

MR. KURUMADA: We'd rest.

MR. BURMESTER: We'd submit it, Your Honor.

THE COURT: All right. I'm revoking the plea in abeyance.

MR. BURMESTER: Your Honor, we would ask that we do a PSR, and that way we can determine a value of the restitution, and then we can just talk about money instead of different people putting things in question.

THE COURT: I'll make it clear for the record: There are four allegations, I believe, in the affidavit.

MR. BURMESTER: Your Honor, I think the

one is just an assertion that the Court made some orders, so it would really be three allegations of violation: Two, 3 and 4.

THE COURT: Mr. Kurumada, if you think I'm wrong, this is your chance to argue, but I'm letting you know what I'm thinking.

Let me put it differently: I know you think I'm wrong, this is still your chance to convince me, but that's --

MR. KURUMADA: Well, all I would say, Judge, is that I think Mr. Martin did the best he could in terms of respecting the Court's order. He did have someone who did the majority of the work with respect to the fence. It wasn't as -- it wasn't maybe as good as Ms. Randazzo wanted, but she also wanted and eight-foot vinyl fence, too, and that was totally not in the spirit of the plea negotiation or the plea in abeyance.

THE COURT: Clearly not.

MR. KURUMADA: And, you know, he was supposed furnish a tree. You are not going to be able to go out and find a 50-foot elm tree.

THE COURT: You can find replacement trees. It's expensive, but that's what happens when you chop down mature trees.

Now, I understand that we didn't talk about it, and I don't know if I would have ordered, you know, a 50-foot elm tree or -- what I do know, it wouldn't have been a sapling. It wouldn't have been something that has about a -- you know, two-inch diameter either.

MR. KURUMADA: Uh-huh.

THE COURT: Be that as it may, I'm not revoking on that because of the ambiguity.

MR. KURUMADA: That's fine --

THE COURT: I'm just indicating for purposes of my ruling, I do believe it's ambiguous. I do believe that Mr. Martin at least violated the spirit of that, but because of its ambiguity, in no way, shape or -- no way, shape or form -- in ruling that he violated the plea in abeyance as a result.

My ruling as to the plea in abeyance goes solely to not having all work done by a licensed third-party, period.

MR. KURUMADA: Okay. I understand.

THE COURT: That's the sole basis.

MR. KURUMADA: Do you want to set -- do you want a PSR?

THE COURT: Do I need a Presentence Report for this?

Tab D

ORIGINAL

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

| | | |
|---|---|---|
| THE STATE OF UTAH, | ) | |
| | ) | 20070426-CA |
| Plaintiff/Appellee, | ) | |
| | ) | |
| vs. | ) | Case No. 041907590 FS |
| | ) | |
| MICHAEL M. MARTIN, | ) | Hon. Deno G. Himonas |
| | ) | |
| Defendant/Appellant. | ) | |

THE ABOVE captioned matter came before the Honorable Deno G. Himonas, on January 19, 2007, at the Matheson Courthouse, Salt Lake City, Utah.

For the State:

FRED BURMESTER
TOM LOPRESTO
Deputy DA's



For the Defendant:

KEVIN KURUMADA
Attorney at Law



Transcriber: CARLTON WAY, CCT





~~20070426-CA~~



20110056-CA

MR. KURUMADA: No objection.
THE COURT: I'll receive it.
Thank you very much.
(State's Exhibit No. 10 Marked and Admitted.)
THE COURT: Anybody else?
MR. LOPRESTO: No, Your Honor.
THE COURT: Thank you.
Mr. Kurumada.
MR. KURUMADA: We'll call Mr. Martin.

MICHAEL MARTIN,

called as a witness on his own behalf, having been duly sworn, was examined and testified as follows:

THE COURT: Go ahead, Mr. Kurumada.

DIRECT EXAMINATION

BY MR. KURUMADA:

Q. State your name for the record, please?

A. Michael Martin.

Q. You are the neighbor of Ms. Randazzo, is that correct?

A. That's correct.

Q. And you've been in a long dispute, civil as well as criminal, with Ms. Randazzo?

A. No, that's not -- as far as -- did you say

criminal, too.

Q. Yes?

A. Yes.

Q. Okay. You went to court, at one point, to try to establish a property line, is that right?

A. Correct.

Q. Okay. Why did you remove this fence?

THE COURT: Does it matter?

MR. KURUMADA: I think so, Judge, because --

You did remove the fence?

THE COURT: Doesn't matter.

MR. KURUMADA: Okay.

Let me ask you: Where -- where did you get this -- oh, I should have this marked as 5.

(Discussion off the Record.)

MR. KURUMADA: Six.

THE COURT: Mr. Kurumada, I understand from my experience with the case, Mr. Martin, if I recall correctly, believed he had a right to remove the fence. That's not where we are now, right? I mean, he's acknowledged liability, so why would his motivation make any difference at this point?

MR. KURUMADA: Well, Your Honor, he is contesting the fact that he did replace the fence, it

was done properly.

THE COURT: I understand that, but why does it matter why he originally tore down the fence?

MR. KURUMADA: Okay, I agree with you there.

Did you replace the fence?

A. Yes, I did.

Q. Twice?

A. No. There was only one time it was replaced and then it was reinforced to what was necessary per her complaint.

Q. Let me show you Exhibit 3 and ask you: Do you recognize that photograph?

A. I do.

MR. KURUMADA: You've seen that haven't you, Fred?

MR. BURMESTER: Which number?

THE COURT: Defendant's Exhibit 3.

MR. BURMESTER: Okay.

MR. KURUMADA: Okay. When did you take that photograph?

A. This winter, this year.

Q. All right. Do you know approximately when?

A. Within the last 30 to 60 days.

Q. All right.

Now, the vines that Ms. Randazzo says you took out, are they reflected in this photograph as growing back?

A. Yes, it -- the vines are reflected in that photograph.

Q. Now, this is Exhibit 4. When was that taken?

A. That was taken about the time we had civil issues of that tree being destructive to private property.

Q. Now, let me direct your attention to the middle of this photograph: That fence is different from this fence in Exhibit 3, is that correct?

A. That is correct.

Q. Is that because the old fence has been replaced by the new fence?

A. This is an older fence on different property. Actually, that's a different property, and that fence has been taken down since -- during this dispute. I don't know the exact date. I probably could find it.

Q. Okay --

THE COURT: Offer 3 and 4?

MR. KURUMADA: Yes.

THE COURT: Any objection?

MR. LOPRESTO: No, Your Honor.

THE COURT: I'll receive them.

MR. KURUMADA: Thank you.

(Defendant's Exhibit Nos. 3 & 4 Marked and Admitted.)

MR. KURUMADA: Mr. Martin, who assisted you in the construction of the fence?

A. Mr. Evan Lee.

Q. And how do you know Mr. Evan Lee?

A. He's personally worked on the property for 20 years.

Q. Do you know what his profession is?

A. Electrician slash handyman.

Q. And when you say "slash handyman", what does that mean?

A. He's been involved in all sorts of handyman-type activities. He's done more than just electrician work on the property. He's helped with cleanup and different things like that.

Q. Let me hand you that other exhibit, (Inaudible), very short letter -- oh, never mind.

(Defendant's Exhibit No. 5 Marked.)

MR. KURUMADA: Let me show you (Handing) what's been marked Exhibit 5.

What is that?

A. A letter signed by Mr. Lee stating that I invited him to assist in the installation of the fence, and he did so.

Q. Okay --

(Discussion off the Record.)

MR. KURUMADA: With respect to Mr. Lee, how did you find him?

A. Personal acquaintance.

Q. Okay. Has he done work for you in the past?

A. Yes, he has.

Q. Is that his website or a website that indicates that that's what he does?

A. Yes, that's his State sites indicating that he's a licensed electrician.

Q. And he assisted you in the construction of the fence?

A. Yes.

(Defendant's Exhibit No. 7 Marked.)

MR. KURUMADA: I'd offer 5 and 6 -- actually, this is marked 7.

I'll offer 5 and 7.

Do you have any objection?

MR. BURMESTER: Not on the website thing.

MR. KURUMADA: That just establishes his --

MR. BURMESTER: The latter, if I may just wait until I can do cross-examination?

THE COURT: You want to voir dire in aid of an objection, go ahead.

VOIR DIRE EXAMINATION

BY MR. BURMESTER:

Q. I'm referring to State's Exhibit -- looking -- I have it, sorry -- Defendant's Exhibit 5. Will you take a look at that?

Lee says in that letter that he helped you, is that correct?

A. Yes.

Q. Install a fence?

A. I asked him to assist, yes.

Q. Okay. And you helped him and he helped you put the fence in the ground --

A. Yes.

Q. -- together?

A. I provided materials and he assisted in finishing up the fence.

Q. Okay. Did you put it in the ground with the assistance of Mr. Lee?

A. With his assistance -- he needed

assistance, and I offered assistance when needed.

Q. Okay. You were there?

A. I was there any time that he -- I -- he did most of the work on, as far as tying off of the fence, and installing the electrical rod, which is required for grounding of a chain-link fence for the -- which requires an electrician to be involved, so he assisted in those things, too.

He also provided the fence and the chain-link meshing, something that he had in his inventory.

THE COURT: Was he there throughout the installation?

THE WITNESS: No. The majority of the time he was there. I assisted with setting the post, which needed some expert assistance because I was taking a class in construction -- concrete -- concrete theory. And needed to be reinforced so that it would be strong enough to hold this fence if there was any type of a severe shaking on the fence. So that he needed some assistance in development of the fence.

MR. BURMESTER: Did you dig the holes?

A. There was no holes dug.

Q. Did you put the fence into the concrete?

A. I poured the concrete into the post to

secure the design of the engineering that I felt was necessary to help secure those posts.

Q. And this State's Exhibit 7, does it --

THE COURT: Defendant's Exhibit 7.

MR. BURMESTER: Defendant's Exhibit 7. Does it state who he's licensed with and for what profession?

A. It says that he's licensed with the State of Utah as a Master Electrician.

Q. Does it say anything about fence installation?

A. Fence installation, no, it does not.

MR. BURMESTER: Okay. No objection, Your Honor.

THE COURT: I'll receive it.

(Defendant's Exhibit Nos. 5 and 7 Admitted.)

DIRECT EXAMINATION (resumed)

BY MR. KURUMADA:

Q. So, when you install a metal fence, you've got to have an electrician to ground it?

A. According to the manufacturer's warranty, if you were to install a galvanized fence you have to follow certain warranty rules which require an electrician to be involved to make sure that the power lines are not above or certain-sized power lines are not within so many feet of the fence in case one were to fall on the fence.

And if something were to fall on the fence, that it's properly grounded even if lighting were to strike.

Q. Okay. And that's what he did as well --

A. Yes, he came out the first day to observe, you know, what was necessary as it pertained to his expertise.

Q. Now, you are under a court order not to go on her property, is that right?

A. That's correct.

Q. So, you couldn't go on the other side of her property and you -- to help install the fence. Did you ever do that?

A. I never did.

Q. Okay, you stayed on that easement -- concrete easement area?

A. I clearly stayed on private property.

Q. Okay. Now, with respect to the elm tree, you did purchase an elm tree?

A. Correct.

Q. Now, you were not directed by the order of the court to replace a 40-foot elm tree, were you?

A. No.

Q. You were just told to furnish another elm tree that could be planted?

A. Correct.

Q. And several times you inquired of me as to whether you should deliver that tree and I said, "No," is that correct?

A. That's correct.

Q. Because of the outstanding order?

A. Correct.

Q. Did you ever attempt -- you were told not to contact her either, correct?

A. That's correct.

Q. Ms. Randazzo.

Did you make any effort through another party to indicate to her that you had purchased an elm tree, and you were trying to get it to her, but you

were afraid to go on her property?

A. Yes, I communicated to you, and I believe we tried to communicate with the District Attorney to contact the client to --

Q. At that time it was Clark Harms?

A. I don't know who the people were, but you were telling me that we were trying to communicate, and I tried to follow through three or four times to find out if anybody was making an attempt to communicate with Ms. Randazzo that the tree was available and we need a place to plant it.

Q. Right. And that was the County Attorney that was going to do that at that time?

A. That's correct.

Q. Did you ever receive any information from me or the County Attorney that Ms. Randazzo had been contacted by Mr. Harms, the Prosecutor, and told to go pick up the tree, or give you directions as to what to do with it, or give him directions to give to you?

A. No, I have received no communications on the matter as to advance it.

Q. Okay. Is that tree still available?

A. Yes, it is.

Q. And it's the same kind of tree?

A. I believe it's a better tree than a

Siberian elm.

Q. Do you know what kind of tree it is?

A. I believe it's a maple tree.

Q. Okay.

MR. KURUMADA: Thank you.

That's all I have.

CROSS-EXAMINATION

BY MR. BURMESTER:

Q. Who replaced the fence?

A. Mr. Lee.

Q. All right. But you were there?

A. Yes, I was there present and he did the tying off of the fence.

Q. When?

A. When? Exact -- in the course of this --

THE COURT: I've heard enough, Mr. Burmester.

MR. BURMESTER: You don't want anymore examination?

THE COURT: (Inaudible).

MR. BURMESTER: Okay.

THE COURT: I don't think so, I mean --

MR. KURUMADA: That's fine.

THE COURT: -- Mr. Kurumada, I think he's frankly acknowledged, at least in my mind, the work